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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK

BY: M. SHAW

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA,

V1300CR201080049

Plaintiff,

STATE'S RESPONSE TO DEFENDANT'S
BENCH MEMORANDUM REGARDING
PROSECUTORIAL MISCONDUCT

vs.

JAMES ARTHUR RAY,

(The Honorable Warren Darrow)

Defendant.

The State of Arizona, through undersigned counsel, respectfully files this response to Defendant's Bench Memorandum Regarding Prosecutorial Misconduct. Defendant's Bench Memorandum is without merit. As set forth in the attached Memorandum of Points and Authorities, the record in this case is clear that the State has not engaged in prosecutorial misconduct.

MEMORANDUM OF POINTS AND AUTHORITIES

The Law:

"Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, 238-239, 172 P.3d 423, 426-427 (App. 2007) quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-109, 677 P.2d 261, 271-272 (1984).

1 In determining whether the prosecutor acted intentionally, knowing his conduct to
2 be improper, and in the pursuit of an improper purpose without regard to the
3 possibility of causing a mistrial, the trial court looks to objective factors,
4 including 'the situation in which the prosecutor found himself, the evidence of
5 actual knowledge and intent[,] . . . any other factors which may give rise to an
6 appropriate inference or conclusion,' and 'the prosecutor's own explanations of
7 his 'knowledge' and 'intent.'

8 *State v. Trani*, 200 Ariz. 383, 384, 26 P.3d 1154, 1155 (App. 2001).

9 There are two types of prosecutorial vouching. "One involves placing the prestige of the
10 government behind a witness and the other suggests that additional unrevealed evidence supports
11 a guilty verdict; both are improper." *State v. Palmer*, 219 Ariz. 451, 453, 199 P.3d 706, 708 (App.
12 2008). Remarks by a prosecutor that bolster a credibility by references to matters outside the
13 record may also constitute prosecutorial misconduct. *State v. Salcido*, 140 Ariz. 342, 344, 681
14 P.2d 925, 927 (App. 1984). "In criminal cases, a prosecutor has a special obligation to avoid
15 'improper suggestions, insinuations, and especially assertions of personal knowledge." *Id.*

16 Normally a party in a criminal trial must not elicit testimony relating to evidence or
17 matters previously ruled inadmissible. However, under the "open door" or "invited error
18 doctrine," when one party procures the admission of improper evidence the "door is open" and
19 the opposing party may then respond or retaliate with evidence on the same subject. *State v.*
20 *Lindsey*, 149 Ariz. 472, 477, 720 P.2d 73, 78 (1986). A party "opens the door" to what would
21 otherwise be inadmissible testimony by opening a "field of inquiry" or creating a "false
22 inference" during the examination of a witness. *State v. Kemp*, 185 Ariz. 52, 60-61, 912 P.2d
23 1281, 1289-90 (1996); *State v. Woratzeck*, 134 Ariz. 452, 454, 657 P.2d 867, 869 (1982). "In
24 essence the 'open door' or 'invited error' doctrine means "that a party cannot complain about a
25 result he caused." *Lindsey, supra*, 149 Ariz. at 477, 720 P.2d at 78, citing *M. Udall & J.*
26 *Livermore, Law of Evidence* § 11 at 11 (2d ed. 1982).

Prosecutorial misconduct requiring a mistrial occurs only when the prosecutor's actions are, in fact, misconduct, and so pronounced and persistent that they permeated the entire trial and probably affected the outcome. *State v. Hughes*, 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998); *State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992). When a mistrial is caused by "intentional judicial or prosecutorial overreaching," double jeopardy may attach. *Pool v. Superior Court, supra*, 139 Ariz. 98, 105, 677 P.2d 261, 268, quoting *State v. Marquez*, 113 Ariz. 540, 542, 558 P.2d 692, 694 (1977). Double jeopardy attaches only when:

1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

State v. Lamar, 205 Ariz. 431, 440, 72 P.3d 831, 840 (2003), quoting *Pool, supra*, 139 Ariz. at 108-09, 677 P.2d at 271-72.

In *State v. Detrich*, 178 Ariz. 380, 873 P.2d 1302 (1994), our Arizona Supreme Court noted that Detrich's first trial ended in a mistrial when a witness for the prosecution mentioned that the defendant had invoked his rights at one point in the investigation. *Id.* at 382, 873 P.2d at 1304. Detrich was convicted after his second trial. On appeal, he cited *Pool v. Superior Court* to support his argument that the original mistrial was the result of misconduct by the State and the second trial put him in double jeopardy. Finding *Pool* distinguishable, the Court stated:

There, the prosecutor deliberately injected error in the first trial in order to force the defendant to request a mistrial. We found the conduct of the prosecutor in *Pool* "egregiously incorrect to the extent that we must infer that the questions were asked with knowledge that they were improper." *Pool*, 139 Ariz. at 107,

1 677 P.2d at 270. Here the record shows no signs of the prosecutor "inviting" the
2 error and with it, necessarily, a mistrial; thus, there was no egregious
3 prosecutorial misconduct in the first trial. Defendant was not subjected to double
jeopardy.

4 *Detrich*, 178 Ariz. at 385, 873 P.2d at 1307.

5 **Legal Argument:**

6 **A. There has been no prosecutorial misconduct in the questioning of witnesses by**
7 **the State.**

8 Despite Defendant's insistence that the State's "over-aggressive and repeated tactics have
9 pushed this matter perilously to the brink of mistrial," a review of the record will show the State
10 has consistently strived to present a factual, truthful and complete representation of the
11 circumstances of this case to the jury and to comply with the rulings of this Court. The State urges
12 the Court to consider each alleged infraction in the full context of the trial testimony in reviewing
13 the accusations by Defendant. In Defendant's motion, snippets of a transcript where a defense
14 objection was sustained are used to assert the State has engaged in improper conduct. Missing
15 from Defendant's Memorandum are the full contexts of the State's questions *prior to and*
16 *following* this Court's ruling sustaining objections. An examination of the transcript makes it
17 clear the State has repeatedly attempted to address both the concerns of defense counsel and this
18 Court in sustaining the objections.¹

19
20 An example of this mischaracterization is shown by the following line of questioning
21 regarding other sweat lodge ceremonies not conducted by Defendant:

22
23 Q. Did the leader of those lodges check on the participants in between
24 rounds?

25 A. Yes.

26 ¹ Defendant only attached the specific pages referenced in his motion. Without the complete transcript the State and this Court is unable to address the argument of Defendant in the complete context of the witness testimony.

1 Q. With respect to the leaders of the other lodges, did you ever are is [sic].
2 Have [sic] a leader of another lodge brag about how hot their lodge was?

3 Mr. LI: Objection, your honor argumentative.

4 MR. HUGHES:

5 Q. Did you ever have a leader of another sweat lodge compare the heat in
6 their lodge to how others do it?

7 MR LI: Objection, Your Honor, develop advance [sic], Relevance.

8 THE COURT: Overruled.

9 THE WITNESS: My understanding is that it's as hot as it needs to be for
10 the participants to have the experience that they're intended to have.

11 *Defendant's Exhibit I, Draft Trial Transcript 3/25/11, at 2:10:2-5.* Evidence in this case has been
12 admitted that shows Defendant had bragged about how hot his sweat lodges were compared to
13 other "weenie" sweat lodges. *Trial Exhibit 747, admitted on 3/9/11, audio clip Thursday 02.14.56*
14 *to 02.55.32.* Clearly the question posed by the prosecutor was not a comment on unadmitted or
15 inadmissible evidence. Moreover, it is clear from the transcript that the prosecutor rephrased the
16 question in a manner the Court found acceptable.

17
18 In a similar manner, Defendant mischaracterizes of the line of questioning relating to the
19 ability of unconscious participants to exit the sweat lodge. While Defendant notes that the initial
20 objection was sustained, he omits the follow-up question the State was allowed to ask without
21 objection. The line of questioning, including the portion referred to in Defendant's Memorandum,
22 is as follows:

23
24 Q. Then you were asked some questions about leaving Mr. Ray's ceremony
25 between rounds. Did Mr. Ray ever tell you how to leave if you were unconscious?

26 MR LI: Objection. Argumentative.

THE COURT: Sustained.

1 Q. BY MS. POLK: Did you have an understanding, sir, of how a person
2 who becomes unconscious could leave the sweat lodge?

3 A. No.

4 *Defendant's Exhibit D, Trial Transcript 3/10/11, at 155:7-16.* The question was rephrased and
5 asked without objection. Defendant's assertion that "notwithstanding this objection, the State
6 repeated the question on April 1" was some type of misconduct is without merit. The question
7 was appropriate based on Defendant's repeated questions relating to participants' freedom and
8 ability to leave the ceremony at any time. As the evidence has shown, that was not the case for
9 participants who were unconscious such as Lizbeth Neuman; it was not the case for Laurie
10 Gennari, who was told she could not leave because the flap was closing, and passed out; and it
11 was not the case for Kirby Brown and James Shore, who were not breathing by the time
12 Defendant ended the ceremony.
13

14 **B. The State has not violated this Court's rulings regarding admissibility of evidence.**

15 Defendant alleges the State has posed questions that "flout" this Court's evidentiary
16 rulings. Like the questions mischaracterized above, this assertion is also without merit. This Court
17 ruled that information relating to other sweat lodge ceremonies could be relevant under certain
18 circumstances. For example, on March 1, 2011, the Court stated:
19

20 So outside of the 404(b) context there may be instances where references to other
21 sweat lodge information could be appropriate. And I dealt with the issue as it was
22 given to me, a 404(b) issue of these prior things happened almost in the nature of
23 being prior bad acts. And I don't think that's the only way they could be
characterized.

24 *Partial Transcript, 3/1/11 at 9:10-17.*

25 The following day, the issue of the prior sweat lodges was also addressed:

26 THE COURT: Ms. Polk, I want to make a ruling that if you think Mr. Li has
brought something up that you need to address. Let's do it that way.

1 I don't see this as a 404(b) issue. And I mentioned that yesterday at the
2 pretrial. I handled the 404(b) motion on the terms it was given to me, and I'm not
3 reconsidering that ruling. That stays.

4 However, there is an issue of causation. And because there is an issue of
5 causation, observations that are based on adequate foundation evidence would be
6 admissible, not the general statements that happened at the 404(b) or were given at
the 404(b) hearing where people wanted to look at a photo and then say this might
have been the condition of somebody.

7 I'm talking about if there is somebody that actually experienced something
8 and has a basis to testify as to what was experienced, that would be admissible on
9 this causation issue. A direct observation of a person. That would be admissible.
Something that a layperson could testify about in accordance with Rule 701.

10 ***

11 The testimony that the state's proposing, as I see it, has nothing to do with
12 that. It has to do with what kind of physical or mental effects occurred at prior
13 sweat lodge events, and that's it. It doesn't have anything to do with something
that bears on somebody's intent, or it cannot anyway.

14 And if it takes a limiting instruction under 105, then it does. But I think if
15 it's carefully confined to the actual observations – again, the foundation is there.

16 *Partial Transcript, 3/2/11 at p. 33:7 to 35:6.*

17 There is no merit to the allegation the State is "flouting" any evidentiary rulings when it
18 poses questions to witnesses relating to the prior sweat lodge events.

19 Defendant claims the State violated this Court's ruling relating to evidence of Defendant's
20 financial condition and business practices when it questioned participants regarding the cost of
21 the Spiritual Warrior Seminar. On January 13, 2011, this Court specifically found that evidence of
22 the cost of the Spiritual Warrior Seminar is admissible:
23

24 Even taking into consideration the nature of the location of the event, the cost of
25 the Spiritual Warrior Retreat is significant. The Court notes that there is legal
26 significance in charging participation or admission fees for such things as
performances, recreational activities, athletic events, and entry to premises. The
jury should be allowed to consider any significance of such evidence in this case.
Through cross-examination, argument or presentation of evidence, the defense can

1 appropriately convey its position regarding such evidence. The Court also
2 determines that the probative value of this evidence would not be substantially
3 outweighed by the danger of unfair prejudice or the other factors listed in Rule
4 403. As noted by the State, this evidence is in the nature of background
5 information that could assist the jury in understanding the general context of
6 events in this case. Evidence of the cost of the Spiritual Warrior Retreat is
7 therefore admissible.

8 *Under advisement ruling on Defendant's Motion in Limine (No. 2) to exclude evidence of*
9 *Defendant's financial condition and business practices, 1/13/11, at pg. 5.*

10 In the two instances cited in Defendant's motion, this Court sustained Defendant's
11 objection. However, given the plain language of the ruling above, it is clear that the State
12 understood the cost of the Spiritual Warrior Retreat, the \$10,000 referenced in the State's
13 questions, to be admissible. Defendant also ignores the State's careful questioning of the Mercers
14 regarding their personal observations of participants during and after sweat lodge ceremonies
15 conducted throughout 2007 to 2009.

16 Conclusion

17 Defendant's trial strategy includes the continuous repetition of comments alluding to
18 "mistrial," "special action" and "reversible error." The record in this matter speaks for itself. This
19 Court has set forth the legal basis for its rulings and should not be swayed by these pleadings by
20 Defendant. While this Response did not address every accusation posed by Defendant, a review
21 of the remainder shows no merit. There is no legal support for Defendant's claim of prosecutorial
22 misconduct.

23 RESPECTFULLY submitted this 11th day of April, 2011.

24
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